AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

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JUN 2 1987

ANN A. BIRCH, CLERK
COLUMBIA, S. C.

United States District Court

DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ALBERT J. DUPRE, JR.

v.

COLUMBIA BOARD OF REALTORS, INC., THE CONSOLIDATED MULTIPLY LISTING SERVICES OF GREATER COLUMBIA, INC.

JUDGMENT IN A CIVIL CASE

ENTERED
6-2-87

CASE NUMBER: C.A. 78-670-0

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or before the Court. The issues have been tried or and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff, Albert J. Dupre, Jr., recover of the defendants, Columbia Board of Realtors, Inc. and The Consolidated Multiple Listing Services of Greater Columbia, Inc., the sum of Five Hundred ($500.00) and no/100 Dollars, which amount is hereby trebled, with post-judgment interest at 7.02%.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants, Columbia Board of Realtors, Inc. and The Consolidated Multiply Listing Services of Greater Columbia, Inc., are permanently enjoined from excluding the plaintiff, Albert J. Dupre, Jr., from membership in and access to the multiple listing services operated by them.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Albert J. Dupre, Jr., shall recover his costs, including attorneys fees.

June 2, 1987
Date

ANN A. BIRCH
Clerk

Nancy M. Harris
Nancy M. Harris
(By) Deputy Clerk

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1987

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

ALBERT J. DUPRE, JR.,	]	CIVIL ACTION 78-670-0
Plaintiff,	]	
-vs-	]	
COLUMBIA BOARD OF REALTORS, INC., THE CONSOLIDATED MULTIPLE LISTING SERVICES OF GREATER COLUMBIA, INC.,	]	O R D E R
Defendants.	]	

This antitrust suit challenges as per se unlawful and facially unreasonable the exclusion of the plaintiff, a licensed real estate broker, from membership in and access to the multiple listing services operated by the defendants. The amended complaint alleges inter alia that the defendants Columbia Board of Realtors, Inc. and Consolidated Multiple Listing Services of Greater Columbia, Inc. (CMLS) have conspired with each other and with others in restraint of commerce to exclude the plaintiff from access to the services operated by them which include the offering for sale and purchase, real estate in the greater Columbia, South Carolina area, to customers within and outside the State of South Carolina, and, further, that the defendants have attempted to monopolize the business of real estate in the greater Columbia, South Carolina area. Plaintiff seeks treble

damages and other relief under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2.[1] The defendants deny that they have acted in violation of the antitrust laws and assert that all actions taken by them in excluding the plaintiff from access to their listing services were proper and reasonable and they seek judgment accordingly. The matter proceeded to trial before the court without a jury and is now ripe for decision. Before ruling on the merits of this controversy the Court must decide two threshold issues.

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[1] 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

#2

) 72A
ev. 8/82)

I.

A.

First, the defendant Consolidated Multiple Listing Services, Inc. (CMLS) argues that this Court is without jurisdiction because the plaintiff has not alleged facts which establish the interstate commerce component of Sherman Act jurisdiction. However, review of the amended complaint reveals that this argument is without merit. The amended complaint asserts inter alia that the plaintiff is a real estate broker, licensed as such by the South Carolina Real Estate Commission and that he is actively engaged in that business; that the defendant Columbia Board of Realtors is a membership corporation and that membership therein is a prerequisite for participation in the multiple listing service operated by the corporation; that defendant Consolidated Multiple Listing Services of Greater Columbia operates another multiple listing service; and that "the activities and business of the parties hereto have at all relevant times been in or affecting interstate commerce." See Amended Complaint, ¶¶. 3,4,5. It is further alleged that the defendants have conspired to exclude plaintiff and others from membership in or access to the multiple listing services operated by them . . . and that "the purpose of the conspiracy are to restrain trade in the business of the sale of real estate and to restrain the plaintiff and others . . . and to eliminate . . . as competitors in interstate commerce the plaintiff and others. . .

#3

(O 72A
Rev. 8/82)

"and that "the conspiracy and its implementation resulted in the loss by plaintiff . . . of numerous sales of real estate and in other injuries and damages." Amended Complaint ¶. 6. Plaintiff further alleges that the defendants have conspired to monopolize the real estate business in the Greater Columbia area "in their attempt to exclude plaintiff from membership in the Multiple Listing Service of defendant Board (Columbia Board of Realtors, Inc.) and to destroy the business of plaintiff. . . ." Amended Complaint ¶. 10. Thus, the plaintiff has indeed alleged activity by the defendants which restrains trade and which affects interstate commerce. Additionally, witnesses testified at trial that mortgage lending firms which operate in the Columbia area take mortgages from federal programs which involve interstate transfers of premiums and settlements, that title insurance is secured from firms located outside South Carolina, and that in many instances sales of real estate in the Columbia area involve out of state purchasers, who are moving into South Carolina. As the Court observed in McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980):

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other

O 72A
(ev. 8/82)

> aspects of respondents' activity that are alleged to be unlawful.

Id. at 242-43. The Court also observed that in a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose or an anticompetitive effect, citing United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978); United States v. Contamer Corp., 393 U.S. 333, 337 (1969); United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950). Here, the jurisdiction requirement of the Sherman Act is established in the pleadings and by the evidence of record. This Court has jurisdiction.

B.

The defendants next argue that this controversy is now moot because the plaintiff was admitted as a participating member of CMLS in November, 1980 and has had the benefit of its listing services ever since, and that, moreover, plaintiff has not established any injury on account of the action of which he complains. Defendant Columbia Board of Realtors ceased operating its listing service in December of 1980. Thus, in the defendants' view, there is no longer a controversy capable of resolution by this Court. These arguments are without merit. A case is not necessarily rendered moot by the voluntary cessation of wrongful conduct. The United States Supreme Court has stated the underlying rationale of this principle as follows:

AO 72A
Rev. 8/82)

> . . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . A controversy may remain to be settled in such circumstances. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightfully refused to grant defendants such a powerful weapon against public law enforcement.

United States v. W. T. Grant Co., 345 U.S. 629 (1953). However, the Court has explained that a case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." Id. But the burden is a heavy one. Even where a defendant states that the alleged violation no longer exists and disclaims any intention to renew them, such does not render the case moot, although it is one of the factors a court may consider in determining whether to grant relief. United States v. W. T. Grant Co., supra at 632-633. Here, while defendant CMLS has admitted plaintiff to membership and has granted and him access to its multiple listing services, the defendants' membership policies remain the same as they were during the period plaintiff was excluded. Moreover, defendant Columbia Board of Realtors continues to exclude plaintiff from

#6

.O 72A
Rev. 8/82)

membership.[2] Thus, while circumstances have, to some extent, changed during the pendency of this case, a live controversy over some issues remain concerning the plaintiff's right to relief.

II.

Plaintiff contends that the defendants established an unlawful group boycott and an unlawful tying arrangement by excluding him from membership in the Columbia Board of Realtors and by excluding him from CMLS through a voting procedure commonly known as a "black ball" system. He asserts that the defendant Columbia Board of Realtors denied him membership for no lawful reason and that he is deprived of the beneficial use of the trademark "Realtor" together with the benefits which arguably ensue from participation in its subsidiary multiple listing service. He further asserts that the same individuals who comprised the membership of the defendant Columbia Board of Realtors constitute the membership of defendant CMLS and that the two groups conspired to restrain trade by excluding him from participation in the multiple listing services operated by them. The defendants deny these allegations. The defendant Columbia Board of Realtors has insisted throughout that plaintiff is denied membership because he maintains his office at his

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[2]While Columbia Board of Realtors terminated its multiple listing services in December, 1980, plaintiff's allegations cover a substantial period of time prior to that date.

#7

O 72A
Rev. 8/82)

residence which, it contends, violates certain criteria to which it adheres concerning the location of offices in conformity with local zoning regulations. Upon consideration of the evidence, the Court finds as follows:

1. On April 18, 1967 the South Carolina Real Estate Commission granted its license to the plaintiff Albert Dupre to conduct business as a real estate broker.[3] Plaintiff has continuously conducted business as a real estate broker since that time.[4]

2. The defendant Columbia Board of Realtors is a membership corporation formed in Columbia, South Carolina in 1913 for purposes inter alia of professional enhancement and exchange of information relevant to the real estate profession including

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[3]Tr. No. 1, pp. 28, 49.

[4]A real estate broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and a third person in transacting business relative to the sale or purchase of real estate. 12 Am Jur. 2d Brok § 1. One whose business is to procure the purchase or sale of lands, acting as middleman or negotiator between potential vendors and purchasers to bring them together and arrange the terms. Quinn v. Phipps, 93 Fla 805, 113 So 419, 54 ALR 1173.

.O 72A
Rev. 8/82)

marketing and sales of real estate. It is affiliated with the South Carolina Association of Realtors and the National Association of Realtors and is guided by the latter in determining its membership. At the time of the trial, there were approximately 767 members of the defendant Columbia Board of Realtors.

3. To become a member of the Columbia Board of Realtors an applicant must have met the eight point criteria of the National Association of Realtors which include inter alia the requirement that the member have an established office in compliance with pertinent zoning regulations.

4. The defendant Columbia Board of Realtors operated a subsidiary multiple listing service (The Columbia Listing Service) from the period February, 1977 until November, 1980 at which time the service was terminated.

5. Membership in the defendant Columbia Board of Realtors was a prerequisite to membership in and access to the sales information compiled and distributed by its subsidiary, the Columbia Listing Service.

6. The plaintiff sought to become a member of defendant Columbia Board of Realtors in August, 1971, November, 1973, November 1976 and August, 1978. Each time, he was rejected.

7. Plaintiff was rejected from membership in the Columbia Board of Realtors in 1976 and 1977 because his office was located at his home. The Board advised the plaintiff that

D 72A
(Rev. 8/82)

the location of his office at home violated deed restrictions which defendant has characterized as a zoning violation.

8. Plaintiff was rejected from membership in the Columbia Board of Realtors in 1978 because of the pendency of this law suit.

9. Plaintiff again applied for membership in the Columbia Board of Realtors in 1980. His application was rejected for the same reasons his prior applications were rejected.

10. The defendant Consolidated Multiple Listing Service of Greater Columbia, Inc. (CMLS) was established March 15, 1977. Membership in CMLS is comprised of real estate brokers in Columbia who receive favorable votes of two-thirds (2/3) of the membership, who vote by secret ballot.

11. Defendant CMLS operates and maintains a multiple listing service which distributes to its members information on real estate which is offered for sale in the Greater Columbia, South Carolina area. Defendant CMLS has at all relevant times had a substantial effect on the real estate market in the Greater Columbia, South Carolina area.

12. The defendants, through their members, have, throughout the period of this controversy and continue to promote and perform a substantial amount of activities which affect interstate commerce. Included are such activities as initiation of financing guaranteed by Federal Programs, financing through interstate services, title insurance obtained from sources

#10

O 72A
Rev. 8/82)

outside South Carolina, interstate referrals made by the defendants to parties outside South Carolina and by such out-of-state parties to these defendants and their customers.

13. Plaintiff applied to defendant CMLS for membership in 1978 and was denied membership. Plaintiff was informed by some members of CMLS that he would not be accepted unless he was already a member of the Columbia Board of Realtors.

14. Members of the defendant Columbia Board of Realtors are active in defendant CMLS and exert substantial influence on policy and decisions on membership applications submitted to CMLS.

15. Membership in and access to multiple listing services are valuable aids to real estate brokers. Advantages of such membership include access to properties offered for sale throughout the geographic area in which properties for sale are listed, without regard to the identity of the real estate broker who secured the listing. Thus, members of multiple listing services may show and sell any property that is listed to prospective customers who engage their services. Such sales, made by members other than the listing agent, are made pursuant to a commission sharing arrangement approved by the governing body of the multiple listing service. Where, as with defendants, the multiple listing services cover substantial amounts of the market, the exclusion of a real estate broker from the multiple

AO 72A
Rev. 8/82)

listing services restricts his (her) ability to effectively compete.

16. Defendants' exclusion of plaintiff from their multiple listing services severely limited his ability to effectively compete and sell real estate in the Greater Columbia, South Carolina area.

17. Plaintiff was admitted to membership in CMLS in November, 1980 when the multiple listing services of both defendants were merged.

18. Plaintiff's denial of membership in the defendant Columbia Board of Realtors and access to its multiple listing services during its existence was without lawful reason.

19. Plaintiff's denial of membership in CMLS and access to its multiple listing services prior to November, 1980 was without lawful reason.

20. Plaintiff's exclusion from membership in and access to the multiple listing services of the defendants was tacitly agreed to by the defendants; and their conduct in excluding plaintiff constitutes a group boycott by the defendants against the plaintiff.

III.

The defendants' refusal to grant plaintiff access to their multiple listing services was a restraint of trade, "in the sense that every commercial agreement restrains trade." Northwest Stationers v. Pacific Stationery & Printing Co., 472

#12

O 72A
Rev. 8/82)

U.S. ___, 86 L.Ed. 2d 202 (1985) citing, Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). Such action violates Section 1 of the Sherman Act if it is adjudged an unreasonable restraint. Id. And determination of that question is made by inquiry under rule of reason principles, unless the challenged conduct constitutes "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northwest Stationers v. Pacific Stationery & Printing Co., supra, Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958); Standard Oil Co. v. United States, 221 U.S. 1 (1911). The Supreme Court instructs that this per se approach permits categorical judgments concerning those business practices that are proven to be predominantly anticompetitive. A court thereby avoids the "significant costs" in "business certainty and litigation efficiency" that a full fledged rule-of-reason inquiry entails. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343, 344 (1982); United States v. Topco Associates, Inc., 405 U.S. 596, 609, 610 (1972). A "decision to apply the per se rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less,

#13

AO 72A
(Rev. 8/82)

competitive.'" Northwest Stationers v. Pacific Stationery & Printing Co., supra, citing Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 19-20 (1979). See also National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) ("per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.")

The United States Supreme Court has consistently held that certain concerted refusals to deal with or "group boycotts" are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of Section 1 of the Sherman Act. See Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959) (manufacturer and distributors of nationally known appliances conspired either not to sell to plaintiff or to sell to it only on unfavorable terms); United States v. General Motors Corp., 384 U.S. 127 (1966) (automobile manufacturer, dealers and dealer associations conspired to refrain from doing business with discount houses); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (membership corporation and several of its members conspired to refuse to provide gas products to manufacturer of gas burners); Associated Press v. United States, 326 U.S. 1 (1945) ((defendant newspaper publishers by concerted action set up system of by-laws which prohibited all Associated Press

AO 72A
Rev. 8/82

members from selling news to non-members and which granted each member powers to block its non-member competitors from membership); Fashion Originators Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (manufacturers of women's garments agreed to sell their products only to garment manufacturers who have in turn agreed to sell only to cooperating retailers and from engaging in other activity with them); Eastern States Retail Lumber Dealers Assn v. United States, 234 U.S. 600 (1914) (conspiracy by retail lumber dealers to prevent wholesale dealers from selling directly to consumers of lumber).

In this case, the Court must determine whether the defendants conduct in refusing to grant the plaintiff membership in and access to their multiple listing services fall within the category that is conclusively presumed unreasonable. "Group boycotts 'are among the the classes of economic activity that merit per se invalidation under Section 1. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. ___ (1985); Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. at 212; Northern Pacific Railway Co. v. United States, 356 U.S. at 5; Silver v. New York Stock Exchange, 373 U.S. at 1246; White Motor Co. v. United States, 372 U.S. 253, 259-260 (1963).

Cases in which the Supreme Court has applied the per se approach have usually involved concerted efforts by a firm or persons to disadvantage competitors by "either directly denying

AO 72A
Rev. 8/82)

or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. ___ (1985) quoting L. Sullivan, Law of Antitrust, 229 at 261-262 (1977); Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (denial of necessary access to exchange members); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (denial of necessary certification of product); Associated Press v. United States, 326 U.S. 1 (1945) (denial of important sources of news); Klors, Inc. v. Broadway-Hale Stores, Inc., supra, (denial of wholesale supplies). In all these cases the boycotting firms possessed a dominant position in the relevant market. In this case too, the defendants possessed the dominant position in the Greater Columbia area which constitutes the relevant market. Additionally, in the cited cases, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.

The defendants argue that by maintaining his office in an enclosed garage at his residence, the plaintiff violates one of the criteria promulgated by the National Association of Realtors which requires a prospective member to have an established office in compliance with pertinent zoning regulations. Defendants do not challenge plaintiff's assertion that he maintains an "established office" as a real estate broker; and

#16

AO 72A
(Rev. 8/82)

they acknowledge his compliance with the remaining criteria of the National Association of Realtors to which they subscribe. Nor have they presented evidence that plaintiff is not in compliance with a zoning law.[5] Instead, defendants point to the existence of a restrictive covenant which allegedly restricts plaintiff's residential neighborhood to residences.[6] In the defendants view, restrictive covenants are the same as zoning laws and, they argue, the violation of a restrictive covenant constitutes violation of a zoning law. Therefore, the argument continues, denial of membership in and access to their multiple listing services was proper and reasonable and their conduct was justified. This argument fails for several reasons.

First, a restrictive covenant is not a zoning law. The rule relied upon by the defendants makes no reference to restrictive covenants.[7] Instead, it has imposed the requirement

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[5]Ms. Debora Smith, testifying on behalf of the defendant Columbia Board of Realtors, acknowledged that plaintiff is not in violation of a zoning law. She testified further that there is no zoning law applicable to the Friersgate community where plaintiff's residence and office are located. Tr. No. 2, p. 175.

[6]The restrictive covenant was not offered as evidence and hence is not set forth herein.

[7]A restrictive covenant is a covenant restricting or regulating the use of real property or the kind, character and location of buildings or other structures that may be erected

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#17

AO 72A

that a prospective member have an established office in compliance with pertinent zoning laws.[8]

The requirement of office location in compliance with zoning laws was promulgated by the National group whose principles the defendants endorse. That group and these defendants are comprised of highly skilled persons engaged in selling and purchasing real estate, arranging such sales, development, arrangement of mortgage financing and other activities consistent with their profession. It is unlikely that a group so well versed in the real estate profession would have assigned a meaning to "zoning law" which varies from its plain meaning. Instead, this Court assumes that if they had intended to include the requirement of obedience to restrictive covenants as a

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thereon, usually created by a condition, covenant, reservation or exception in a deed, but susceptible of creation by contract not involving transfer of title to land and by implication. 20 Am. Jur. 2d Cov. §§ 165 et seq.

[8]Zoning is the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may be developed in an orderly manner in accordance with a comprehensive plan. Best v. Zoning Board of Adjustment, 141 A 2d 606. A zoning law or ordinance is a legislative act representing a legislative determination and judgment. Zoning is a local matter, and the creation and modification of zones is a matter of municipal (or other governmental legislation). 82 Am. Jur. 2d Zoning and Planning §§ 1, 2.

#18

AO 72A
Rev. 8/82)

condition of membership they would have done so.[9] Second, defendants have not shown that the requirement of office location is reasonably necessary to a procompetitive accomplishment of the benefits derived from membership in their multiple listing services. The primary rationale offered to support the requirement of office location is that it (the requirement) operates to promote a public image of ethical and competent conduct by realtors.[10] They further argue that a realtor who operates his business in violation of local zoning laws discredits the real estate profession and tarnishes the image of realtor.[11] But where, as here, the state extensively regulates its real estate profession, " provides a collective community judgment as to the standards of professional conduct and responsibility necessary to protect the public from harm." United States v. Realty Multi-Listing, Inc., 629 F. 2d 1351, 1377 (5th Cir. 1980).

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[9]Restrictive covenants are distinguished from zoning regulations in that the covenants are a matter of contract creating rights in the nature of servitudes or easements, whereas zoning regulations constitute a governmental exercise of the police power and must bear a substantial relation to the public health, safety, morals or general welfare. 82 Am. Jur. 2d Zoning and Planning § 4.

[10]Tr. No. 2, pp. 203, 206, 207, 228.

[11]Tr. No. 2, pp. 204-205.

#14

AO 72A

Indeed, additional criteria for membership in a multiple listing service may be imposed if the state regulations are not adequate,

> "When a multiple listing service meets to establish the reasonable necessity of membership criteria regulating areas already generally covered by state regulation, it must make a showing either that the legitimate needs of the service require protection in excess of that provided by the state or that the state does not adequately enforce its own regulations."

United States v. Realty Multi-Listing, Inc., 629 F.2d at 1380. South Carolina extensively regulates the character and conduct of real estate brokers, and for violation of its regulations, the state, through its Real Estate Commission, imposes a range of sanctions, including "disbarment."[12] Thus, it is evident that South Carolina extensively regulates both the integrity and the competence of licensed real estate brokers.

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[12]South Carolina provides for the competency of real estate brokers by requiring three years experience as a salesman plus ninety hours of instruction by applicants for broker licenses or that they acquire five years equivalent experience in a business activity closely related to real estate transactions. S.C. Code Ann. § 40-57-100. Additionally, the applicant must pass an examination. Id. The applicant must prove that he (she) possesses qualities of honesty, integrity, truthfulness and good reputation" before being allowed to take the examination. S.C. Code Ann. § 40-57-110. The South Carolina Real Estate Commission may suspend or revoke a license for a wide range of ethical violations and it may revoke a license for incompetence unrelated to ethical violations. S.C. Code Ann. 40-57-170. Finally, it is unlawful for anyone to act as a real estate broker without being licensed by the South Carolina Real Estate Commission. S.C. Code Ann. § 40-57-20.

#26

AO 72A

Finally, it has not been shown that the rule of office location relied upon by the defendants is reasonably necessary to the accomplishment of some pro-competitive benefit provided by their multiple listing services. Indeed, the 1976 chairman of Columbia Realty Board's membership committee testified that the rule only serves to promote the defendants' public image and not to promote competition.[13] What one court has stated is particularly apt here:

> The requirement that a broker be in compliance with local zoning regulations in the placement of his office has nothing to do with the listing or sale of properties or with the protection of its members or the public engaging in the purchase and sale of improved residential real property. That requirement does have the anti-competitive potential of being used to exclude more marginal or part time brokers from membership in the multiple listing service. (Emphasis added).

Colorado ex rel McFarlane v. Colorado Springs Board of Realtors, 1980-81 Trade Cases at p. 77.510.

The record establishes that here the requirement relied upon by the defendants had had the same effect. While the requirement that a broker be in compliance with local zoning laws in the placement of his office has nothing to do with the listing or sale of properties or with protection of either its members or persons seeking to purchase or sell real property, it has the

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[13] Tr. No. 2, p. 228.

#21

AO 72A
(Rev. 8/82)

anti-competitive potential of being used and has been used in this case to exclude the plaintiff from membership in the defendants' multiple listing services. Defendants' exclusion of the plaintiff from their multiple listing services was, if anything more egregious, because he did not violate the rule upon which they rely. The Court concludes that the defendants' asserted reason for excluding the plaintiff from their multiple listing services was not reasonably necessary to the accomplishment any pro-competitive benefit and that the exclusion of plaintiff from defendants' multiple listing services constitutes a group boycott and is per se illegal under the Sherman Act.

IV.

Having determined that the defendants violated the Sherman Act by excluding the plaintiff from their multiple listing services, the Court concludes that the plaintiff is entitled to judgment on his first cause of action. Consideration is now directed to determination of the appropriate relief to which he is entitled.

While the plaintiff seeks treble damages he has not presented evidence of his damages. Instead, plaintiff's accountant has testified concerning his income during the years 1976,

#22

AO 72A
Rev. 8/82)

1977, 1978, 1979 and 1980,[14] the years plaintiff was denied access to the multiple listing services operated by the defendants. And in proposals submitted to the Court, plaintiff's counsel has urged the Court to find an amount of damages based upon mathematical projections devised by him. These projections however do not constitute evidence that will support a finding of a specific award of damages. To award the plaintiff more than nominal or inconsequential damages, the Court would have to resort to conjecture and surmise.

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[14]Plaintiff's accountant Frank Cain testified that the plaintiff earned real estate commission income as follows: 1976, $58,683.00; 1977, $68,342.00; 1978, $88,183.00; 1979, $80,053.00; 1980, $71,241.00; and a projected figure for 1981 of $58,582.00. Tr. No. 1, pp. 17, 18. Additionally, plaintiff testified that prior to joining CMLS he was confined to selling newly constructed homes since he did not have access to "used home" listings which were included in defendants' multiple listing services; that most new homes were "open listings" which builders would allow any broker to sell and that he (plaintiff) directed his efforts toward the sale of new homes when he was not a member of a listing service. Tr. No. 1, pp. 40, 41. He testified that after joining CMLS in November 1980 90% of his sales commissions were earned from the sales of used homes. Tr. No. 1, p. 41. Plaintiff also testified that "within the last two years the new home market is really almost non existent. The builders are in trouble. . . . Interest rates have sky rocketed to the place that hew home construction is really bad." Tr. No. 1, pp. 41, 42. Plaintiff presented no testimony that he had potential buyers of real estate and was unable to offer specific properties to them by reason of his exclusion from defendants' multiple listing services. Nor has he presented other evidence that specific sales opportunities were lost. No theory was presented, by way of evidence, that the plaintiff would have earned certain income but for his exclusion. So, while the plaintiff might have had the opportunity to display and sell some additional proper-

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#23

AO 72A

However, the plaintiff is entitled to injunctive relief. While the evidence establishes that the Columbia Board of Realtors terminated its multiple listing service in December, 1980 it is apparent that this defendant has not changed the policy which it relied upon to exclude the plaintiff from membership. The defendant Consolidated Multiple Listing Services Inc. granted the plaintiff a membership in November, 1980 and he has had access to that defendant's multiple listing service ever since. While the plaintiff is no longer excluded, he was excluded from the time he applied for membership until November, 1980 after this suit was commenced. It cannot be said that the conduct of which the plaintiff complains is not capable of repetition.

In conclusion, I find for the plaintiff on the allegations of his first cause of action.

Plaintiff shall recover from the defendants the sum of Five Hundred ($500.00) Dollars, which amount is hereby trebeled.

The defendants are permanently enjoined from excluding the plaintiff from membership in and access to the multiple listing services operated by them.

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ties during the years he was excluded from the defendants' multiple listing services, no finding of a specific amount of damages may be made on the evidence thus presented.

AO 72A
(Rev. 8/82)

The plaintiff shall recover his costs, including attorneys fees.

IT IS SO ORDERED.

MATTHEW J. PERRY
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina,

May 26, 1987.

A TRUE COPY
Attest: Ann A. Birch, Clerk

By: Nancy M. Griffin
Deputy Clerk

AO 72A
(Rev. 8/82)